

AMENDED IN ASSEMBLY APRIL 7, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 473

Introduced by Assembly Member Charles Calderon

February 15, 2011

An act to add Section 17052 to the Business and Professions Code, relating to unfair competition.

LEGISLATIVE COUNSEL'S DIGEST

AB 473, as amended, Charles Calderon. Unfair competition.

Existing law defines unfair competition and makes unlawful specified business practices intended to injure competitors or destroy competition. Existing law specifies criminal penalties and civil remedies for violations, including injunctive relief and damages.

~~This bill would state the intent of the Legislature to enact legislation that would add provisions to the Business and Professions Code making it an act of unfair competition to sell or offer for sale in this state a product that is manufactured by a person using stolen or misappropriated information technology in its business operations, where the product is sold or offered for sale in this state in competition with a product that is manufactured without the use of that stolen or misappropriated information technology.~~

This bill would make it unlawful for any person to manufacture any article or product that is sold or offered for sale in this state while using stolen or misappropriated information technology, as defined, in its business operations in competition with another article or product manufactured without the use of stolen or misappropriated information technology, except as specified. The bill would require written notice containing specified information under penalty of perjury to be provided

to a defendant prior to commencement of an action under these provisions. The bill would make violations of its provisions subject to specified civil remedies, including injunctive relief and recovery of damages, would provide that existing criminal penalties would not apply to those violations, and would authorize certain persons and entities, including the Attorney General, to bring actions under these provisions. The bill would authorize claims for damages against certain 3rd parties who sell or offer for sale products made in violation of these provisions, except as specified.

Because this bill would expand the scope of the existing crime of perjury, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

*Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: ~~no~~-yes.*

The people of the State of California do enact as follows:

- 1 *SECTION 1. The Legislature finds and declares all of the*
- 2 *following:*
- 3 *(a) Manufacturers are a vital source of jobs and economic*
- 4 *growth in the State of California. Law-abiding manufacturers in*
- 5 *this state suffer lost sales, market share, and jobs when they are*
- 6 *forced to compete against companies that use stolen or*
- 7 *misappropriated information technology to reduce production*
- 8 *costs and gain a competitive edge.*
- 9 *(b) The theft of American information technology is particularly*
- 10 *rampant in foreign markets, reaching as high as 90 percent in*
- 11 *some countries. Intellectual technology theft costs the United States*
- 12 *economy thousands of jobs and billions of dollars in economic*
- 13 *growth.*
- 14 *(c) The use of stolen or misappropriated information technology*
- 15 *unfairly lowers manufacturers' costs of production by tens if not*
- 16 *hundreds of thousands of dollars. Manufacturers that knowingly*
- 17 *use significant amounts of stolen or misappropriated information*

1 *technology to reduce their costs should not be allowed to benefit*
2 *from their illegal acts.*

3 *(d) Existing laws relating to unfair trade practices do not*
4 *adequately address the harm that occurs when manufacturers use*
5 *stolen or misappropriated information technology to gain an unfair*
6 *competitive advantage over companies that play by the rules.*

7 *(e) It is the purpose of this act to enable effective recourse*
8 *against manufacturers that obtain an unlawful competitive*
9 *advantage by using stolen or misappropriated information*
10 *technology to make goods.*

11 *(f) To accomplish this purpose, law-abiding manufacturers who*
12 *have suffered economic harm from a directly competing*
13 *manufacturer's sale of products made using stolen or*
14 *misappropriated information technology should be allowed to*
15 *pursue a cause of action against the company that used the stolen*
16 *or misappropriated information technology.*

17 *(g) The remedies available to the law-abiding manufacturer in*
18 *these cases should be limited to ensure that the relief obtained is*
19 *proportional to the harm and should protect businesses that make*
20 *good faith efforts to act in accordance with their legal*
21 *responsibilities.*

22 *(h) It is the intent of the Legislature that this act shall be*
23 *construed in ways that appropriately remedy the competitive harm*
24 *that occurs when articles or products manufactured by businesses*
25 *using stolen or misappropriated information technology are sold*
26 *or offered for sale in this state.*

27 *SEC. 2. Section 17052 is added to the Business and Professions*
28 *Code, to read:*

29 *17052. (a) (1) For purposes of this section, the following*
30 *definitions apply:*

31 *(A) "Article or product" means any tangible article or product,*
32 *but shall exclude: (i) any services sold, offered for sale, or made*
33 *available in this state, including free services and online services,*
34 *(ii) any product subject to regulation by the United States Food*
35 *and Drug Administration and that is primarily used for medical*
36 *or medicinal purposes, (iii) food and beverages, and (iv) restaurant*
37 *services.*

38 *(B) "Copyrightable end product" means a work within the*
39 *subject matter of copyright as specified in Section 102 of Title 17*

1 of the United States Code and includes mask works protection as
2 specified in Section 902 of Title 17 of the United States Code.

3 (C) “Essential component” means a component of an article
4 or product provided or to be provided to a thirdparty pursuant to
5 a contract, including a purchase order, without which that article
6 or product will not perform as intended and for which there is no
7 substitute component available that offers a comparable range
8 and quality of functionalities and is available in comparable
9 quantities and at a comparable price.

10 (D) “Manufacture” means to directly manufacture, produce,
11 or assemble an article or product subject to paragraph (2), in
12 whole or substantial part, but shall not include contracting with
13 or otherwise engaging another person (or that person engaging
14 another person) to develop, manufacture, produce, or assemble
15 an article or product subject to paragraph (2).

16 (E) “Material competitive injury” means at least a 3 percent
17 retail price difference between the article or product made in
18 violation of paragraph (2) designed to harm competition and a
19 directly competing article or product that was manufactured
20 without the use of stolen or misappropriated information
21 technology, the price difference occurring over a four-month period
22 of time.

23 (F) “Retail price” of stolen or misappropriated information
24 technology is the retail price of the information technology charged
25 at the time of, and in the jurisdiction where, the alleged theft or
26 misappropriation occurred, multiplied by the number of stolen or
27 misappropriated items used in the business operations of the person
28 alleged to have violated paragraph (2).

29 (G) (i) “Stolen or misappropriated information technology”
30 means hardware or software that the person referred to in
31 paragraph (2) acquired, appropriated, or used without the
32 authorization of the owner of the information technology or the
33 owner’s authorized licensee in violation of applicable law, but
34 shall not include situations in which the hardware or software
35 alleged to have been stolen or misappropriated was not available
36 for retail purchase on a stand-alone basis at or before the time it
37 was acquired, appropriated, or used by the person.

38 (ii) Information technology shall be considered to be used in a
39 person’s business operations if the person uses the technology in

1 *the manufacture, distribution, marketing, or sales of the articles*
2 *or products subject to paragraph (2).*

3 (2) *Any person who manufactures any article or product while*
4 *using stolen or misappropriated information technology in its*
5 *business operations after notice and opportunity to cure as*
6 *provided in subdivision (b) and, with respect to remedies sought*
7 *under paragraph (6) of subdivision (c) or subdivision (d), causes*
8 *a material competitive injury as a result of the use of stolen or*
9 *misappropriated information technology, shall be deemed to*
10 *engage in an unfair act if the article or product is sold or offered*
11 *for sale in this state, either separately or as a component of another*
12 *article or product, and in competition with an article or product*
13 *sold or offered for sale in this state that was manufactured without*
14 *violating this subdivision. Any person who engages in a violation*
15 *of this subdivision, and any articles or products manufactured by*
16 *the person in violation of this subdivision, shall be subject to the*
17 *liabilities and remedial provisions of this section in an action by*
18 *the Attorney General or any person described in paragraph (5) of*
19 *subdivision (c), except as provided in paragraphs (3) and (4) and*
20 *in subdivisions (b) to (f), inclusive.*

21 (3) *No action may be brought under this section, and no liability*
22 *shall result, under any of the following:*

23 (A) *The end article or end product sold or offered for sale in*
24 *this state and alleged to violate paragraph (2) is:*

25 (i) *A copyrightable end product.*

26 (ii) *Merchandise manufactured by or on behalf of, or pursuant*
27 *to a license from, a copyright owner and which displays or*
28 *embodies a name, character, artwork, or other indicia of or from*
29 *a work that falls within clause (i), or merchandise manufactured*
30 *by or on behalf of, or pursuant to a license from, a copyright or*
31 *trademark owner and which displays or embodies a name,*
32 *character, artwork, or other indicia of or from a theme park, theme*
33 *park attraction, or other facility associated with a theme park.*

34 (iii) *Packaging, carrier media, or promotional or advertising*
35 *materials for any end article, end product, or merchandise that*
36 *falls within clause (i) or (ii).*

37 (B) *The allegation that the information technology is stolen or*
38 *misappropriated is based on a claim that the information*
39 *technology or its use infringes a patent or misappropriates a trade*

1 *secret under applicable law or that could be brought under any*
2 *provision of Title 35 of the United States Code.*

3 *(C) The allegation that the information technology is stolen or*
4 *misappropriated is based on a claim that the defendant's use of*
5 *the information technology violates the terms of a license that*
6 *allows users to modify and redistribute any source code associated*
7 *with the technology free of charge.*

8 *(D) The allegation is based on a claim that the person violated*
9 *paragraph (2) by aiding, abetting, facilitating, or assisting someone*
10 *else to acquire, appropriate, use, sell, or offer to sell, or by*
11 *providing someone else with access to, information technology*
12 *without authorization of the owner of that information technology*
13 *or the owner's authorized licensee in violation of applicable law.*

14 *(4) No injunction may be issued against a person other than the*
15 *person adjudicated to have violated paragraph (2), and no*
16 *attachment order may be issued against articles or products other*
17 *than articles or products in which the person alleged to violate*
18 *paragraph (2) holds title. A person other than the person alleged*
19 *to violate paragraph (2) includes any person other than the actual*
20 *manufacturer who contracts with or otherwise engages another*
21 *person to develop, manufacture, produce, market, distribute,*
22 *advertise, or assemble an article or product alleged to violate*
23 *paragraph (2).*

24 *(5) A violation of this section shall not be subject to Section*
25 *17100 and the provisions of Chapter 5 (commencing with Section*
26 *17200) of Part 2 of Division 7 shall not apply to this section. The*
27 *remedies provided under this section are the exclusive remedies*
28 *for the parties.*

29 *(b) (1) No action may be brought under paragraph (2) of*
30 *subdivision (a) unless the person subject to those provisions*
31 *received written notice of the alleged use of the stolen or*
32 *misappropriated information technology from the owner or*
33 *exclusive licensee of the information technology or the owner's*
34 *agent and the person did either of the following:*

35 *(A) Failed to establish that its use of the information technology*
36 *in question did not violate paragraph (2) of subdivision (a).*

37 *(B) Failed, within 90 days after receiving notice, to cease use*
38 *of the owner's stolen or misappropriated information technology;*
39 *provided, however, that if the person commences and thereafter*
40 *proceeds diligently to replace the information technology with*

1 *information technology whose use would not violate paragraph*
2 *(2) of subdivision (a), that period shall be extended for an*
3 *additional period of 90 days, not to exceed 180 days total. The*
4 *information technology owner or its agent may extend any period*
5 *described in this paragraph.*

6 *(2) To satisfy the requirements of this subdivision, a written*
7 *notice shall, under penalty of perjury:*

8 *(A) Identify the stolen or misappropriated information*
9 *technology.*

10 *(B) Identify the lawful owner or exclusive licensee of the*
11 *information technology.*

12 *(C) Identify the applicable law the person is alleged to be*
13 *violating and state that the notifier has a reasonable belief that*
14 *the person has acquired, appropriated, or used the information*
15 *technology in question without authorization of the owner of the*
16 *information technology or the owner's authorized licensee in*
17 *violation of the applicable law.*

18 *(D) To the extent known by the notifier, state the manner in*
19 *which the information technology is being used by the defendant.*

20 *(E) State the articles or products to which such information*
21 *technology relates.*

22 *(F) Specify the basis and the particular evidence upon which*
23 *the notifier bases the allegation.*

24 *(3) The written notification shall state that, after a reasonable*
25 *and good faith investigation, the information in the notice is*
26 *accurate based on the notifier's reasonable knowledge,*
27 *information, and belief. This written notification shall be made*
28 *under penalty of perjury.*

29 *(c) (1) No earlier than 90 days after the provision of notice in*
30 *accordance with subdivision (b), the Attorney General, or a person*
31 *described in paragraph (5), may bring an action against any*
32 *person that is subject to paragraph (2) of subdivision (a):*

33 *(A) To enjoin a violation of paragraph (2) of subdivision (a),*
34 *including by enjoining the person from selling or offering to sell*
35 *in this state articles or products that are subject to paragraph (2)*
36 *of subdivision (a), except as provided in paragraph (6); provided*
37 *that the injunction shall not encompass articles or products to be*
38 *provided to a thirdparty that establishes that the thirdparty has*
39 *satisfied one or more of the affirmative defenses set forth in*

1 paragraph (1) of subdivision (e) with respect to the manufacturer
2 alleged to have violated paragraph (2) of subdivision (a).

3 (B) After a determination by the court that the person has
4 violated paragraph (2) of subdivision (a), to recover the greater
5 of either of the following:

6 (i) Actual direct damages, which may be imposed only against
7 the person who violated paragraph (2) of subdivision (a).

8 (ii) Statutory damages of no more than the retail price of the
9 stolen or misappropriated information technology, which may be
10 imposed only against the person who violated paragraph (2) of
11 subdivision (a).

12 (2) If the person alleged to have violated paragraph (2) of
13 subdivision (a) has been subject to a final judgment or has entered
14 into a final settlement, or any products manufactured by the person
15 and alleged to violate paragraph (2) of subdivision (a) have been
16 the subject of an injunction or attachment order, in any federal or
17 state court in this state or any other state, arising out of the same
18 theft or misappropriation of information technology, the court
19 shall dismiss the action with prejudice. If the person is a defendant
20 in an ongoing action, or any products manufactured by the person
21 and alleged to violate paragraph (2) of subdivision (a) are the
22 subject of an ongoing injunction or attachment order, in any
23 federal or state court in this state or any other state, arising out
24 of the same theft or misappropriation of information technology,
25 the court shall stay the action against the person pending resolution
26 of the other action. In the event the other action results in a final
27 judgment or final settlement, the court shall dismiss the action
28 with prejudice against the person. Dismissals under this paragraph
29 shall be res judicata to actions filed against the person alleged to
30 have violated paragraph (2) of subdivision (a) arising out of the
31 same theft or misappropriation of information technology.

32 (3) (A) After determination by the court that a person has
33 violated paragraph (2) of subdivision (a) and entry of a judgment
34 against the person for violating those provisions, the Attorney
35 General, or a person described in paragraph (5), may add to the
36 action a claim for actual direct damages against a thirdparty who
37 sells or offers to sell in this state products made by that person in
38 violation of paragraph (2) of subdivision (a), subject to the
39 provisions of subdivision (e); provided, however, that damages

1 *may be imposed against a thirdparty only if all of the following*
2 *apply:*

3 *(i) The thirdparty's agent for service of process was properly*
4 *served with a copy of a written notice sent to the person alleged*
5 *to have violated paragraph (2) of subdivision (a) that satisfies the*
6 *requirements of subdivision (b) at least 90 days prior to the entry*
7 *of the judgment.*

8 *(ii) The person who violated paragraph (2) of subdivision (a)*
9 *did not make an appearance or does not have sufficient attachable*
10 *assets to satisfy a judgment against the person.*

11 *(iii) The person either manufactured the final product or*
12 *produced a component equal to 30 percent or more of the value*
13 *of the final product.*

14 *(iv) The person has a direct contractual relationship with the*
15 *thirdparty respecting the manufacture of the final product or*
16 *component.*

17 *(v) The thirdparty has not been subject to a final judgment or*
18 *entered into a final settlement in any federal or state court in this*
19 *state or any other state arising out of the same theft or*
20 *misappropriation of information technology; provided, however,*
21 *that in the event the thirdparty is a party to an ongoing suit for*
22 *damages, or has entered an appearance as an interested thirdparty*
23 *in proceedings in rem, in any federal or state court in this state or*
24 *any other state arising out of the same theft or misappropriation*
25 *of information technology, the court shall stay the action against*
26 *the thirdparty pending resolution of the other action. In the event*
27 *the other action results in a final judgment, the court shall dismiss*
28 *the action with prejudice against the thirdparty and dismiss any*
29 *in rem action as to any articles or products manufactured for the*
30 *thirdparty or that have been or are to be supplied to that thirdparty.*
31 *Dismissals under this section shall be res judicata to actions filed*
32 *against the person alleged to have violated paragraph (2) of*
33 *subdivision (a) arising out of the same theft or misappropriation*
34 *of information technology.*

35 *(B) An award of damages against the thirdparty pursuant to*
36 *this paragraph shall be the lesser of the retail price of the stolen*
37 *or misappropriated information technology at issue or two hundred*
38 *fifty thousand dollars (\$250,000), less any amounts recovered from*
39 *the person adjudicated to have violated paragraph (2) of*

1 subdivision (a), and subparagraph (A) of paragraph (4) shall not
2 apply to the award or recovery against the thirdparty.

3 (C) An award of damages pursuant to this paragraph shall not
4 be made prior to July 1, 2013.

5 (4) A court may do any of the following in an action under this
6 section:

7 (A) In an action against the person adjudicated to have violated
8 paragraph (2) of subdivision (a), increase the damages up to three
9 times the damages authorized by subparagraph (B) of paragraph
10 (1) if the court finds that the person's use of the stolen or
11 misappropriated information technology was willful.

12 (B) With respect to an award under paragraph (1) only, award
13 costs and reasonable attorney's fees to either of the following:

14 (i) A prevailing plaintiff in actions brought by an injured person
15 under paragraph (2) of subdivision (a).

16 (ii) A prevailing defendant in actions brought by an allegedly
17 injured person.

18 (C) With respect to an action under paragraph (3) brought by
19 a private plaintiff only, award costs and reasonable attorney's
20 fees to a thirdparty for all litigation expenses, including, without
21 limitation, discovery expenses incurred by that party if it prevails
22 on the requirements set forth in clause (iii) of subparagraph (A)
23 of paragraph (3) or to a thirdparty who qualifies for an affirmative
24 defense under subdivision (e); provided, however, in a case in
25 which the thirdparty received a copy of the notification described
26 in clause (i) of subparagraph (A) of paragraph (3) at least 90 days
27 before the filing of the action under paragraph (3), that with
28 respect to a thirdparty's reliance on the affirmative defenses set
29 forth in subparagraphs (C) and (D) of paragraph (1) of subdivision
30 (e), the court may award costs and reasonable attorney's fees only
31 if all of the conduct on which the affirmative defense is based was
32 undertaken by the thirdparty, and the thirdparty notified the
33 plaintiff of that conduct, prior to the end of the 90-day period.

34 (5) A person shall be deemed to have been injured by the sale
35 or offer for sale of a directly competing article or product subject
36 to paragraph (2) of subdivision (a) if the person establishes all of
37 the following by a preponderance of the evidence:

38 (A) The person manufactures articles or products that are sold
39 or offered for sale in this state in direct competition with articles
40 or products that are subject to paragraph (2) of subdivision (a).

1 (B) *The person's articles or products were not manufactured*
2 *using stolen or misappropriated information technology of the*
3 *owner of the information technology.*

4 (C) *The person suffered economic harm, which may be shown*
5 *by evidence that the retail price of the stolen or misappropriated*
6 *information technology was twenty thousand dollars (\$20,000) or*
7 *more.*

8 (D) *If the person is proceeding in rem or seeks injunctive relief,*
9 *that the person suffered material competitive injury as a result of*
10 *the violation of paragraph (2) of subdivision (a).*

11 (6) (A) *If the court determines that a person found to have*
12 *violated paragraph (2) of subdivision (a) lacks sufficient attachable*
13 *assets in this state to satisfy a judgment rendered against it, the*
14 *court may enjoin the sale or offering for sale in this state of any*
15 *articles or products subject to paragraph (2) of subdivision (a),*
16 *except as provided in paragraph (4) of subdivision (a).*

17 (B) *To the extent that an article or product subject to paragraph*
18 *(2) of subdivision (a) is an essential component of a thirdparty's*
19 *article or product, the court shall deny injunctive relief as to the*
20 *essential component, provided that the thirdparty has undertaken*
21 *good faith efforts within the thirdparty's rights under its applicable*
22 *contract with the manufacturer to direct the manufacturer of the*
23 *essential component to cease the theft or misappropriation of*
24 *information technology in violation of paragraph (2) of subdivision*
25 *(a), which may be satisfied, without limitation, by the thirdparty*
26 *issuing a written directive to the manufacturer demanding that it*
27 *cease that theft or misappropriation and demanding that the*
28 *manufacturer provide the thirdparty with copies of invoices,*
29 *purchase orders, licenses, or other verification of lawful use of*
30 *the information technology at issue.*

31 (7) *The court shall determine whether a cure period longer than*
32 *the period established in subdivision (b) would be reasonable given*
33 *the nature of the use of the information technology that is the*
34 *subject of the action and the time reasonably necessary either to*
35 *bring the use into compliance with applicable law or to replace*
36 *the information technology with information technology that would*
37 *not violate paragraph (2) of subdivision (a). If the court deems*
38 *that a longer cure period would be reasonable, the action shall*
39 *be stayed until the end of that longer cure period. If by the end of*
40 *that longer cure period, the defendant has established that its use*

1 of the information technology in question did not violate paragraph
2 (2) of subdivision (a), or the defendant ceased use of the stolen or
3 misappropriated information technology, the action shall be
4 dismissed.

5 (d) (1) In a case in which the court is unable to obtain personal
6 jurisdiction over a person subject to paragraph (2) of subdivision
7 (a), the court may proceed in rem against any articles or products
8 that are subject to paragraph (2) of subdivision (a) and sold or
9 offered for sale in this state in which the person alleged to have
10 violated paragraph (2) of subdivision (a) holds title. Except as
11 provided in paragraph (4) of subdivision (a) and paragraphs (2)
12 to (4), inclusive, all such articles or products shall be subject to
13 attachment at or after the time of filing a complaint, regardless of
14 the availability or amount of any monetary judgment.

15 (2) At least 90 days prior to the enforcement of an attachment
16 order against articles or products pursuant to paragraph (1), the
17 court shall notify any person in possession of the articles or
18 products of the pending attachment order. Prior to the expiration
19 of the 90-day period, any person for whom the articles or products
20 were manufactured, or to whom the articles or products have been
21 or are to be supplied, pursuant to an existing contract or purchase
22 order, may do either of the following:

23 (A) Establish that the person has satisfied one or more of the
24 affirmative defenses set forth in paragraph (1) of subdivision (e)
25 with respect to the manufacturer alleged to have violated
26 paragraph (2) of subdivision (a), in which case the attachment
27 order shall be dissolved only with respect to those articles or
28 products that were manufactured for the person, or have been or
29 are to be supplied to the person, pursuant to an existing contract
30 or purchase order.

31 (B) Post a bond with the court equal to the retail price of the
32 allegedly stolen or misappropriated information technology or
33 twenty-five thousand dollars (\$25,000), whichever is less, in which
34 case the court shall stay the enforcement of the attachment order
35 against those articles or products and shall proceed on the basis
36 of its jurisdiction over the bond. The person posting the bond shall
37 recover the full amount of the bond, plus interest, after the issuance
38 of a final judgment.

39 (3) If the person posting the bond pursuant to subparagraph
40 (B) of paragraph (2) is entitled to claim an affirmative defense in

1 subdivision (e), and that person establishes with the court that it
2 is entitled to that affirmative defense, the court shall award costs
3 and reasonable attorney's fees to the person posting the bond and
4 against the plaintiff in the event the plaintiff proceeds with an
5 action pursuant to paragraph (3) of subdivision (c) against the
6 person posting the bond.

7 (4) If that the court does not provide notification as described
8 in paragraph (2), the court, upon motion of any thirdparty, shall
9 stay the enforcement of the attachment order for 90 days as to
10 articles or products manufactured for the thirdparty, or that have
11 been or are to be supplied to the thirdparty, pursuant to an existing
12 contract or purchase order, during which 90-day period the
13 thirdparty may avail itself of the options set forth in paragraph
14 (2).

15 (e) (1) A court shall not award damages against any thirdparty
16 pursuant to paragraph (3) of subdivision (c) if that party, after
17 having been afforded reasonable notice of at least 90 days by
18 proper service upon the party's agent for service of process and
19 an opportunity to plead any of the affirmative defenses set forth
20 in this paragraph, establishes by a preponderance of the evidence
21 any of the following:

22 (A) The person is the end consumer or end user of an article or
23 product subject to paragraph (2) of subdivision (a), or acquired
24 the article or product after its sale to an end consumer or end user.

25 (B) The person is a business with annual revenues not in excess
26 of fifty million dollars (\$50,000,000).

27 (C) The person either:

28 (i) Acquired the articles or products and had code of conduct
29 or other written document governing the person's commercial
30 relationships with the manufacturer adjudicated to have violated
31 paragraph (2) of subdivision (a) that includes commitments, such
32 as general commitments to comply with applicable laws, that
33 prohibit use of the stolen or misappropriated information
34 technology by the manufacturer, or written assurances from the
35 manufacturer of the articles or products that the articles or
36 products, to the manufacturer's reasonable knowledge, were
37 manufactured without the use of stolen or misappropriated
38 information technology in the manufacturer's business operations;
39 provided, that within 180 days of receiving written notice of the
40 judgment against the manufacturer for violation of paragraph (2)

1 of subdivision (a) and a copy of a written notice that satisfies the
2 requirements of subdivision (b), the person undertakes
3 commercially reasonable efforts to do any of the following:

4 (I) Exchange written correspondence confirming that the
5 manufacturer is not using such stolen or misappropriated
6 information technology in violation of paragraph (2) of subdivision
7 (a), which may be satisfied, without limitation, by obtaining written
8 assurances from the manufacturer accompanied by copies of
9 invoices, purchase orders, licenses, or other verification of lawful
10 use of the information technology at issue.

11 (II) Direct the manufacturer to cease the theft or
12 misappropriation, which may be satisfied, without limitation, by
13 the thirdparty issuing a written directive to the manufacturer
14 demanding that it cease the theft or misappropriation and
15 demanding that the manufacturer provide the thirdparty with copies
16 of invoices, purchase orders, licenses, or other verification of
17 lawful use of the information technology at issue. A thirdparty
18 shall not be required to take any other action to fully avail itself
19 of this defense.

20 (III) In a case in which the manufacturer has failed to cease the
21 theft or misappropriation within the 180-day period, and the
22 thirdparty has not fulfilled either subclause (I) or (II), cease the
23 future acquisition of the articles or products from the manufacturer
24 during the period in which the manufacturer continues to engage
25 in the theft or misappropriation subject to paragraph (2) of
26 subdivision (a) where doing so would not constitute a breach of
27 an agreement between the person and the manufacturer for the
28 manufacture of the articles or products in question that was entered
29 into on or July 1, 2012.

30 (ii) Acquired the articles or products pursuant to an agreement
31 between the person and a manufacturer for the manufacture of the
32 articles or products in question that was entered into on or July
33 1, 2012; provided that within 180 days of receiving written notice
34 of the judgment against the manufacturer for violation of
35 paragraph (2) of subdivision (a) and a copy of a written notice
36 that satisfies the requirements of subdivision (b), the person
37 undertakes commercially reasonable efforts to do any of the
38 following:

39 (I) Obtain from the manufacturer written assurances that the
40 manufacturer is not using such stolen or misappropriated

1 *information technology in violation of paragraph (2) of subdivision*
2 *(a), which may be satisfied, without limitation, by obtaining written*
3 *assurances from the manufacturer accompanied by copies of*
4 *invoices, purchase orders, licenses, or other verification of lawful*
5 *use of the information technology at issue.*

6 *(II) Direct the manufacturer to cease the theft or*
7 *misappropriation, which may be satisfied, without limitation, by*
8 *the thirdparty issuing a written directive to the manufacturer*
9 *demanding that it cease the theft or misappropriation and*
10 *demanding that the manufacturer provide the thirdparty with copies*
11 *of invoices, purchase orders, licenses, or other verification of*
12 *lawful use of the information technology at issue. A thirdparty*
13 *shall not be required to take any other action to fully avail itself*
14 *of this defense.*

15 *(III) In a case in which the manufacturer has failed to cease the*
16 *theft or misappropriation within the 180-day period, and the*
17 *thirdparty has not fulfilled either subclause (I) or (II), cease the*
18 *future acquisition of the articles or products from the manufacturer*
19 *during the period that the manufacturer continues to engage in*
20 *the theft or misappropriation subject to paragraph (2) of*
21 *subdivision (a) where doing so would not constitute a breach of*
22 *the agreement.*

23 *(D) The person has made commercially reasonable efforts to*
24 *implement practices and procedures to require its direct*
25 *manufacturers, in manufacturing articles or products for the*
26 *person, not to use stolen or misappropriated information*
27 *technology in violation of paragraph (2) of subdivision (a). A*
28 *person may satisfy this subparagraph by doing either of the*
29 *following:*

30 *(i) Adopting and undertaking commercially reasonable efforts*
31 *to implement a code of conduct or similar written requirements*
32 *that are applicable to the person's direct manufacturers and that*
33 *prohibit use of stolen or misappropriated information technology*
34 *by the manufacturer, subject to a right of audit, and the person*
35 *either (I) has a practice of auditing its direct manufacturers on a*
36 *periodic basis in accordance with generally accepted industry*
37 *standards, or (II) requires in its agreements with its direct*
38 *manufacturers that they submit to audits by a thirdparty, which*
39 *may include a thirdparty association of businesses representing*
40 *the owner of the stolen or misappropriated intellectual property,*

1 *and further provides that a failure to remedy any deficiencies found*
2 *in the audit that constitute a violation of the applicable law of the*
3 *jurisdiction where the deficiency occurred shall constitute a breach*
4 *of the contract, subject to cure within a reasonable period of time.*

5 *(ii) Adopting and undertaking commercially reasonable efforts*
6 *to implement a code of conduct or similar written requirements*
7 *that are applicable to the person's direct manufacturers and that*
8 *prohibit use of stolen or misappropriated information technology*
9 *by the manufacturer, and the person undertakes practices and*
10 *procedures to address compliance with the prohibition against*
11 *the use of the stolen or misappropriated information technology*
12 *in accordance with the applicable code of conduct or written*
13 *requirements.*

14 *(E) The person does not have a contractual relationship with*
15 *the person alleged to have violated paragraph (2) of subdivision*
16 *(a) respecting the manufacture of the articles or products alleged*
17 *to have been manufactured in violation of paragraph (2) of*
18 *subdivision (a).*

19 *(2) A thirdparty shall have the opportunity to be heard regarding*
20 *whether an article or product is an essential component provided*
21 *or to be provided to the thirdparty, and shall have the right to file*
22 *a motion to dismiss any action brought against it under paragraph*
23 *(3) of subdivision (c).*

24 *(3) The court shall not enforce any award for damages against*
25 *the thirdparty until after the court has ruled on that party's claim*
26 *of eligibility for any of the affirmative defenses set out in this*
27 *subdivision, and prior to the ruling may allow discovery, in an*
28 *action under paragraph (3) of subdivision (c), only on the*
29 *particular defenses raised by the thirdparty.*

30 *(4) The court shall allow discovery against a thirdparty on an*
31 *issue only after all discovery on that issue between the parties has*
32 *been completed and only if the evidence produced as a result of*
33 *the discovery does not resolve an issue of material dispute between*
34 *the parties.*

35 *(5) Any confidential or otherwise sensitive information submitted*
36 *by a party pursuant to this subdivision shall be subject to a*
37 *protective order.*

38 *(f) The provisions of this section are severable. If any provision*
39 *of this section or its application is held invalid, that invalidity shall*

1 *not affect other provisions or applications that can be given effect*
2 *without the invalid provision or application.*

3 *SEC. 3. No reimbursement is required by this act pursuant to*
4 *Section 6 of Article XIII B of the California Constitution because*
5 *the only costs that may be incurred by a local agency or school*
6 *district will be incurred because this act creates a new crime or*
7 *infraction, eliminates a crime or infraction, or changes the penalty*
8 *for a crime or infraction, within the meaning of Section 17556 of*
9 *the Government Code, or changes the definition of a crime within*
10 *the meaning of Section 6 of Article XIII B of the California*
11 *Constitution.*

12 ~~SECTION 1. It is the intent of the Legislature to enact~~
13 ~~legislation that would add provisions to the Business and~~
14 ~~Professions Code making it an act of unfair competition to sell or~~
15 ~~offer for sale in this state a product that is manufactured by a person~~
16 ~~using stolen or misappropriated information technology in its~~
17 ~~business operations, where the product is sold or offered for sale~~
18 ~~in this state in competition with a product that is manufactured~~
19 ~~without the use of that stolen or misappropriated information~~
20 ~~technology.~~